ACQUIREMENT OF PROPERTY BY SECRETARY OF THE INTERIOR.

When the Secretary of the Interior in the exercise of a reasonable discretion determines as to the validity of title to rights and property to be acquired by him under the provisions of the act of June 17, 1902, his decision is conclusive upon the accounting officers.

(*Decision by Assistant Comptroller Mitchell, May 19, 1906.*)

The Secretary of the Treasury requested a reexamination of the account of the Pecos Irrigation Company, settled by the Auditor for the Interior Department April 25, 1906.

The facts appear to be as follows:

The United States bought of the Pecos Irrigation Company certain lands, canals, dams, franchises, and property appurtenant thereto in Eddy County, N. Mex., particularly described in a deed executed by said company on December 18, 1905, recorded March 26, 1906, in book 16, at page 277 et seq., in the recorder's office of said county of Eddy, New Mexico.

For said lands and franchises and appurtenances thereto the United States agreed to pay $150,000, for which the Auditor, upon the request of the Secretary of the Interior, stated an account.

The Assistant Attorney-General assigned to the Department of the Interior has, at the request of the Secretary of the Interior, examined an abstract of title and the title papers to said lands and rendered an opinion that the title to said lands, franchises, and appurtenances thereto was conveyed to the United States by the said deed with certain minor imperfections of titles particularly set forth hereinafter.

To cover possible loss to the Government on account of said imperfections in the title and to protect it against a supposed lien under a mortgage to secure some bonds issued by the irrigation company an indemnity bond has been executed and accepted. The Secretary of the Interior has approved said title and accepted said lands and recommended payment therefor on the title shown. He has also accepted and gone into possession of said lands, and is now improving them and constructing said irrigation works thereon.

After stating the account for the amount claimed, the Auditor appears to have called your attention to the fact that there were imperfections in the title conveyed as aforesaid by the grantor, and suggested that you suspend payment and cause a reexamination to be made by the Comptroller as to the legality and policy of accepting an indemnity bond to cover any loss that may arise as a consequence of the said lien and imperfections in the title conveyed by the grantor.

This is the only reason shown why a reexamination is requested.

The defects of title indicated by the Assistant Attorney-General are in lands described as follows:

That part of the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section 30, township 18 south, range 27 east, lying east of the Pecos River, on the left bank thereof. This tract is of little value.

The west half of block 9 in Otis, lot 28, block 2 in Florence, for lack, as to both, of any authoritative declaration of the beneficiary, and purpose of the trusts and powers of the trustees in the deeds (243, 253, 254), creating the trusts, to which these properties are subject.

The Assistant Attorney-General was of the opinion that all the property remains subject to a lien for the payment of bonds amounting to $1,400 and interest created by the Pecos Irrigation and Improvement Company under two mortgages executed in favor of the Central Trust Company of New York, trustee, dated, respectively, February 1, 1901, and November 1, 1902, to secure mortgage bonds issued by the Pecos Irrigation and Improvement Company.

He makes the following statement as to said bonds:

"One thousand four hundred dollars of these bonds are the property of one Mrs. Espinasse, who in the early summer of 1898, through the Credit Lyonnais, Paris, France, deposited bonds of the former Pecos Irrigation and Investment Company for conversion and exchange into bonds of the Pecos Irrigation Company, since which time she has not claimed her property, nor has trace of her been found or of any one claiming the bonds, though her former financial agent, the Credit Lyonnais, the Central Trust Company of New York, and the Pecos Irrigation Company have made every effort to locate her. Under these circumstances, the Pecos Irrigation Company has paid into the Central Trust Company mortgages, the full sum of $2,590, principal and interest of the $1,400, to maturity of the bonds February 1, 1926, and proposes to give a bond for $3,000 to fully indemnify and hold the United States harmless of all defects of title."

The Attorney-General has advised the Secretary of the Interior that section 355 of the Revised Statutes does not apply as to the manner in which the validity of title to lands acquired by him under the act of June 17, 1902 (32 Stats., 388), shall be evidenced. (See copy of letter from Acting Attorney-General to Secretary of the Interior, dated May 24, 1904.)

Section 7 of the act of June 17, 1902, *supra*, provides:

"That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process." * * *

Under this provision the Secretary of the Interior is vested with discretion to determine what property he will acquire, so long as it is acquired for the purpose of carrying out the provisions of this act.

He must also decide whether he will acquire said property by purchase or by condemnation proceedings. In carrying out this provision he must decide whether condemnation proceedings are necessary. Such a decision would necessarily involve a decision of the questions as to whether the price at which it is proposed to sell is reasonable, and, further, whether a good and valid title can be conveyed in the absence of such proceedings.

The first is a question of fact which is committed by Congress to the judgment and discretion of the Secretary of the Interior, and his decision thereon is conclusive. (*Bates & Guild Co.* v. *Payne*, 194 U. S., 106, 109.)

The validity of the title is a question of law (6 Op. Att. Gen., 432). It is a question, however, which is in the first instance committed to the judgment and discretion of the Secretary of the Interior to decide before he can authorize the purchase or approve the expenditure of money in making the purchase or in making improvement thereon.

This being so, it would not, in an action to recover the purchase price of the land, be reviewed by the courts unless he has exceeded his authority, or the court should be of the opinion that his decision was clearly wrong. (*Decatur* v. *Paulding*, 14 Pet., 497; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316; *Redfield* v. *Windom*, 137 U. S., 636; *Bates & Guild Co.* v. *Payne*, *supra*.)

It must not be understood by this that the Secretary of the Interior is authorized to expend the money appropriated under the act of June 17, 1902, to pay for lands to which he *does not acquire* a valid title. The approval of such a purchase would be unauthorized.

The most that can be said is that his action in approving a title and a purchase "will carry with it a strong presumption of its correctness" unless his decision on the title should be held to take the place of the opinion of the Attorney-General when given under section 355 of the Revised Statutes.

In the case of *Bates & Guild Co.* v. *Payne*, *supra*, the court, after a review of the cases, stated the rule to be as follows (p. 109):

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a Department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

Under this rule I am of the opinion that the decision of the Secretary of the Interior as to the validity of title, as it affects the right to payment for property purchased, under the act of June 17, 1902, *supra*, and the expenditure of money in making improvements thereon, is entitled to the same weight as the opinion of the Attorney-General when given under the provisions of section 355 of the Revised Statutes. If he approves the purchase and the title he binds the United States, and it is bound to pay the price agreed upon. (*Ryan* v. *United States*, 136 U. S., 68, 86.)

A refusal of the accounting officers to follow such decision would necessitate an examination by the accounting officers

as to the validity of title to all property purchased under the provisions of said act, and would leave the final decision of the question as to the validity of the title and as to whether a valid title within the meaning of said act could be acquired without condemnation proceeding to the accounting officers. In other words, by refusing to accept as sufficient a title which the Secretary of the Interior has decided to be sufficient, condemnation proceedings could be forced upon the Secretary of the Interior by the accounting officers. In this way the accounting officer would in certain cases decide as to the necessity for condemnation proceedings. This power was clearly intended to be lodged in the Secretary of the Interior when he was given power to "acquire any rights or property" * * * for the United States by purchase or "by condemnation under judicial process." I do not think that the Secretary of the Interior would be authorized to submit to this office a deed and an abstract to property that he contemplated purchasing and request a decision as to whether he could acquire a good title to said property without bringing condemnation proceedings, and as to whether if he did purchase the property on the title shown he would be authorized to make payment therefor.

In such case I am of the opinion that I would not be justified in passing on the sufficiency of the title conveyed, but would make my decision as to the right of the Secretary to make payment depend upon his decision as to whether he acquired a good title by the proposed conveyance or not.

If, however, the question of the validity of title is an open one, to be decided by the Comptroller independently of the action of the Secretary of the Interior thereon, he could require a decision as to the validity of title as to every tract of land that he proposed to acquire under said act before he authorized payment therefor, and it would be the duty of the accounting officer to investigate the validity of every title independently of the decision of the Secretary of the Interior thereon.

I am of the opinion that Congress intended to commit to the judgment and discretion of the Secretary of the Interior all questions as to the validity of the title to rights and property to be acquired by him under the act of June 17, 1902.

His decision rendered on such question in the exercise of a reasonable discretion should be treated as conclusive on the accounting officers. (See case of *Bates & Guild Co.* v. *Payne*, *supra*, p. 110.)

He appears to have considered and decided every question that would affect the title to the lands purchased and to have decided that the United States has acquired under the conveyance made a good and valid legal title to all the lands purchased with the exceptions named above.

He has further decided to accept and pay for all of the property conveyed as a whole and for an entire consideration, notwithstanding the defects in the title to the small and unimportant tracts indicated, in consideration of the company having given an indemnifying bond to hold the United States harmless against said defect, and for the purpose of avoiding further delay in the prosecution of the work by securing possession at once under this arrangement.

The contract of purchase was approved by the Secretary of the Interior March 19, 1906, after a full consideration of the defect of title.

The Secretary of the Interior would doubtless have had the right to have refused to approve the purchase of the property by reason of these defects, but he could not have repudiated the purchase in part and insisted on the conveyance as to the residue without paying the entire consideration. If he had repudiated the purchase because of such defects, he would have been compelled to make a new contract as to the tracts bought or refused to approve the contract and proceed by condemnation as to the whole if he wanted it. This he clearly did not deem advisable.

I am of the opinion that the Secretary of the Interior did not exceed his authority in making the purchase under the circumstances stated, notwithstanding the defects of title indicated. I am further of the opinion that the acceptance of an indemnifying bond to protect against the small defects in the title, and in order to secure immediate possession of the larger properties without delay, was a rightful exercise of his power under said act, and that the payment of the entire consideration was warranted under the circumstances.

All other questions that in any way affect the payment

are questions that would affect the title and were necessarily considered and decided by the Secretary of the Interior in deciding the question as to the validity of the title.

There is no law which prohibits the United States from purchasing property encumbered by liens. (10 Op. Att. Gen., 353.)

Every one of the defects in the title had been disclosed at the time the Secretary of the Interior approved the contract of purchase, which was made subject to his approval.

Knowing of the defects and of the supposed lien he accepted the property with the title shown and exacted the indemnity bond as a protection against the possible defects of title and supposed liens and has gone into possession under the deed.

The action of the Auditor is therefore approved.

LIABILITY OF GENERAL STOREKEEPER FOR SERVICES OF LABORER CONVERTED TO HIS PERSONAL USE.

Service performed by a laborer at a navy-yard under the direction of the general storekeeper in and about his quarters is not "labor in general storehouses" and is not authorized by law, and the general storekeeper is liable to the United States for the value of services thus unlawfully converted to his personal use.

(*Decision by Assistant Comptroller Mitchell, May 21, 1906.*)

James A. Ring, pay director, United States Navy, appealed April 17, 1906, from the action of the Auditor for the Navy Department in settlement, dated April 12, 1906, charging him with the amount paid by the United States to Martin Gallagher for services as laborer in the office of the general storekeeper, as per labor rolls of the navy-yard, Boston, Mass., from June 1, 1903, to August 31, 1905, and amounting to $1,310.36.

The Auditor's action was based on the following statement by the Acting Secretary of the Navy in his indorsement of January 27, 1906:

"Pay Director Ring did, however, receive the benefit of personal services rendered by Martin Gallagher while car-